206.838.9100 MAIN PHONE 206.838.9101 MAIN FAX

Two Union Square 601 Union St, Suite 4950 Seattle, WA 98101

Thomas F. Peterson 206.838.9112 tpeterson@sociuslaw.com

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COMMUNITY DEVELOPMENT

August 27, 2008

Jack Pace
Carol Lumb
City of Tukwila
Department of Community Development
6300 Southcenter Blvd., Suite 100
Tukwila, WA 98188

SOCIUSLAWGROUPPLIC

Re: <u>Tukwila Shoreline Master Program</u>

Dear Tukwila Planning Commission.

We represent Mellon Trust of Washington as successor trustee of the Desimone Trust ("Desimone"). Desimone owns more than a dozen industrial zoned parcels and one commercial property that border the Green/Duwamish River. Attached hereto as Exhibit A is a copy of a map depicting the parcels owned by Desimone. Most of the parcels contain structures that are located within 100 feet of the river.

We write in opposition to the adoption of the proposed Tukwila Shoreline Master Program ("SMP") as it is currently drafted. We further write to request that the City of Tukwila ("City") continue the public hearing set for August 28, 2008 to permit property owners adequate time to evaluate the impacts of the current draft of the SMP.

Lack of Notice/Public Participation

Desimone objects to the inadequate notice it was given and the lack of public participation in the drafting process of the current SMP. Desimone received notice of the draft SMP and public hearing on August 14, just two weeks before the hearing. Two weeks' time is insufficient for a property owner to evaluate a plan that is over 120 pages. Desimone has had insufficient time to consult with professionals to fully understand and evaluate the impact of the draft SMP on its

EXHIBIT 5 DATE 8/28/08
PROJECT NAME
Smp update

properties. Only after such an evaluation can property owners provide meaningful feedback to the City.

Desimone also objects to the notices that were mailed because the City mailed them to the taxpayers instead of the registered property owners. For many properties in the industrial areas, the taxpayer of the property is a tenant, not the property owner. The result is that the persons or entities that have the greatest stake in providing comments did not receive the notices timely, if at all.

The lack of public participation in drafting the proposed SMP is contrary to state law. In developing master programs and amendments, the City is required to make all reasonable efforts to inform, fully involve and encourage participation of all interested persons and private entities. See RCW 90.58.130; WAC 173-26-090. Additionally, when such changes implicate the Growth Management Act, the City is required to establish a public participation program. The program must include the dissemination of informative materials, proposals and alternatives, opportunity for written comments, public meetings, and consideration of and response to public comments. The City has failed to meet the public participation standards set forth in the Shoreline Management Act (the "Act") and the Regulations.

The City has apparently been working on the current draft of the SMP for well over a year. The first draft was submitted to the Department of Ecology (the "DOE") in July 2007. The City did not invite the public to participate during this initial draft. No notices were given, no public hearings were held, and the public was not invited to comment. Only after the DOE's review did the City invite public participation. Such participation, however, only included the public hearing scheduled for August 28, 2008, for which only two weeks notice was given. Such limited notice and participation is not what was intended by the Act and the Regulations.

The City appears to be in a rush to obtain approval of its draft SMP. The City, however, is not required to adopt an updated SMP until December 1, 2009. Therefore, the City's rush is not justified at the expense of meaningful public participation and comment. This is especially so given the potential significant consequences of the draft SMP on existing property owners. At a minimum, the City should continue the public hearing to allow property owners sufficient time to evaluate the impacts of the draft SMP. Desimone concurs with the comments of other property owners that the City should also form a property owners' advisory group that would participate in the drafting of a new draft SMP.

Objections to Buffer Widths

As noted above, Desimone has not had ample time to fully evaluate the impacts of the draft SMP. Despite the short notice period, however, it is readily apparent that the SMP will have a devastating impact on several Desimone properties.

The SMP increases the proposed buffer for most of the property owned by Desimone to 100 feet. Desimone will lose all economically viable use of some of its properties, and will be severely limited in its ability to develop others. The loss of development rights could result in damages in the millions of dollars.

The buffers amount to an uncompensated taking of private property. For some of the Desimone property, the 100 foot buffer would render the entire property not developable. Indeed, existing structures on some of the Desimone property are entirely within the 100 foot buffer. A prohibition on development in those areas would strip the property of all economically viable uses. Without just compensation, such development prohibitions amount to a regulatory taking.

For example, the Airpro (No. 042304-9083) and Secret Gardens Statuary (No. 042304-9169) parcels are each little more than 100 feet deep measured from the water. When considering the required setback from Pacific Highway South along with the proposed buffer, there is no viable means of redeveloping those properties under the draft SMP. Further, the potential loss of viable businesses hurts the public because it will result in a decrease of the City's tax base.

Further, the buffers are illegal because they are not related or proportional to the impacts of property development. An exaction becomes a taking when it is solely to confer a benefit upon the public rather than to correct a problem created by the land developer. To justify an exaction without compensation, there must be a sufficient nexus between some public problem caused by the proposed development and the exaction that is designed to alleviate the problem. Additionally, the City has the burden to show specific impacts that the development would cause and to establish that proposed exactions are proportional to those impacts. The SMP fails to tie the buffer widths to the impacts of development.

Also troubling is the inadequate explanation for the buffer width increase. The SMP does not adequately explain why 100 or 125 foot buffers are required or how these numbers were derived. While the SMP does mention that these buffers are needed to permit a regrading of a 2.5:1 slope, there is similarly no explanation for how the 2.5:1 slope was calculated. This figure appears to have been arbitrarily selected. Further, it appears that the buffers widths were selected for the purpose of accommodating enhancements to the shoreline habitat. The cost of such improvements is not the responsibility of the individual property owners; it is a public benefit that should be publicly funded.

Upon information and belief, the initial draft of the SMP sent to the DOE in July 2007 contained flexible buffers.³ This approach seems much more sensible given that the shorelines abutting each property will have different slopes and characteristics. The City has not provided the public

² See Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

¹ See Nollan v. California Coastal Comm'n, 488 U.S. 825, 837 (1987).

³ The City refused to provide a copy of the draft sent to the DOE unless a written request was first made through a Public Disclosure Act request. We were not able to obtain a copy before the deadline for this submission.

any information concerning why the flexible buffers were abandoned. Nor is it clear whether the City considered buffer averaging or other devices to minimize the impact on property owners.

Objections to Development Standards

The development standards are overly restrictive and impose extremely expensive obligations on property owners. For instance, the height limits in the draft SMP are more restrictive than the underlying zoning regulations. The SMP will impose increased and expensive requirements for levees. The SMP will impose infeasible requirements for the location of parking lots and loading areas without taking into consideration the unique characteristics of each property. The SMP will also impose extremely expensive landscaping requirements. The removal of all non-native vegetation and replacement of native vegetation is a significant and expensive undertaking. Such an undertaking would be imposed as a result of minor improvements to an owner's property. Additional objections will likely be found upon a more comprehensive review.

Further, the SMP would require owners to provide public access to the shoreline, together with amenities such as drinking fountains, benches, etc. for the public. This imposes a significant burden on property owners. Again, the nexus between the impact of development and the exaction for public access is not clear in the SMP. Nor does the SMP state how the public access exactions are proportional to the impact of development. Without such a showing, the exactions without compensation amount to a taking.

Moreover, the SMP fails to consider the zoning classification of any given property. Public access should be weighed against the characteristics of the property. Property that is zoned residential would likely draw more of the public to the shoreline. Public access, therefore, could be enhanced. Properties zoned heavy industrial, however, are not likely to draw as much public interest. In such areas, the public access requirements should be more limited. The SMP should take the characteristics of the property into account when exacting public access requirements, instead of the one-size-fits-all requirements currently in the draft SMP.

Lack of Protection for Existing Developments

The requirements of the draft SMP are triggered on existing properties and uses based on relatively minor events. Such events include a change in occupancy of a building, minor exterior improvements to a building, or even paving some or all of the owner's property.

Additionally, the draft SMP provides that properties are subject to the existing nonconforming use provisions in the Tukwila Municipal Code ("TMC"), Section 18.70. A nonconforming structure would lose its grandfathered status if the structure was destroyed by any means to an extent more than 50 percent of its replacement value or if the structure is vacated or abandoned for two consecutive years. TMC 18.70.050.

Rather than rendering a vast amount of existing structures as nonconforming uses from the outset, the SMP should recognize the existing structures and uses as <u>conforming</u> and incorporate

them into the plan. Additionally, the City should consider extending the exception in TMC 18.70.050(2), which allows destroyed residential structures that were in conformance at the time of construction to be reconstructed to their original dimensions and location, to other zoning classifications. The City should also extend the vacancy period for industrial properties, which are more difficult to find tenants for in times of economic downturn.

Conclusion

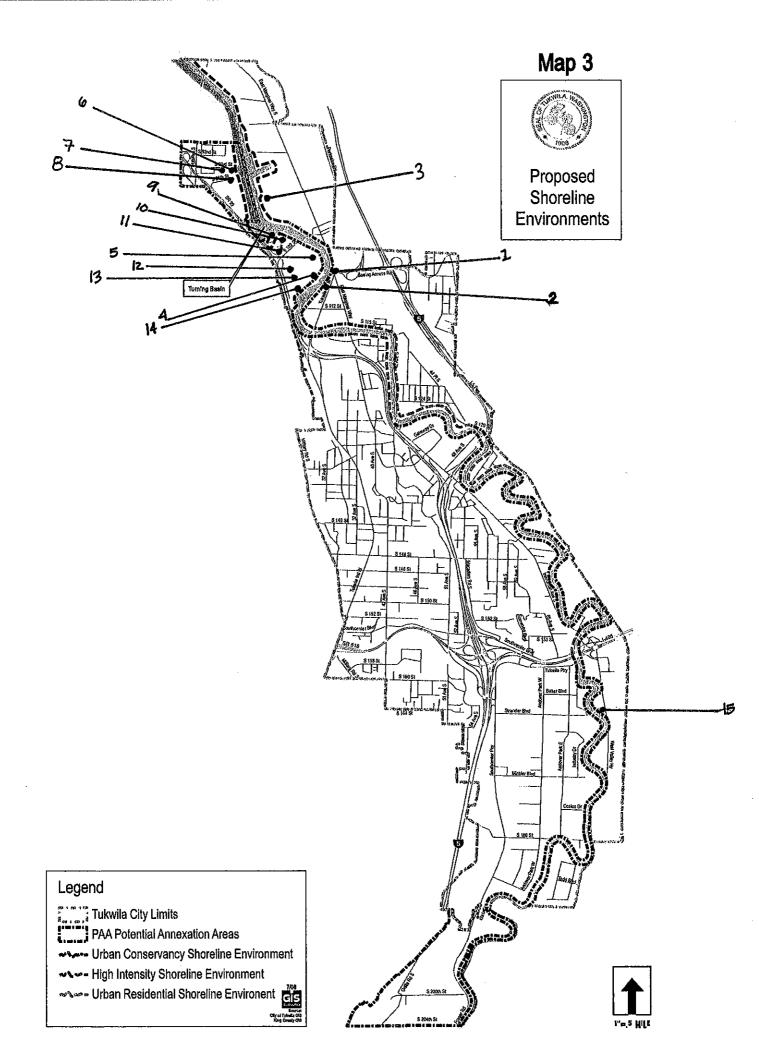
Desimone respectfully requests that the City halt its current review process. A revised draft SMP should be prepared after meaningful public participation, which should include the creation of a property owners' advisory group. In the short-term, the City should continue the public hearing set for August 28, 2008 to enable property owners to more fully evaluate the impact of the draft SMP.

Very truly yours.

Thomas F. Peterson

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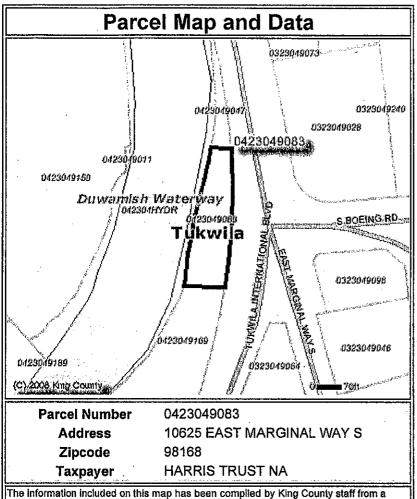
Enclosures: Desimone Property Map



Desimone Trust Properties

| Property Tax Acct # | Tenant |
|---|------------------------------|
| 1. 042304-9083 | Airpro |
| 2. 042304-9169 | Secret Garden Statuary |
| 3. 562420-0990 4. 042304-9011 5. 042304-9150 | Boeing |
| 6. 000160-0061 7. 000160-0029 8. 000160-0062 | Duwamish Marina |
| 9. 042304-9187 10. 042304-9001 11. 042304-9073 | Multiple tenants ("Fremont") |
| 12. 0423049190 13. 0423049186 14. 0423049189 | Sabey |
| 15. 252304-9007-04 | Barnabys |

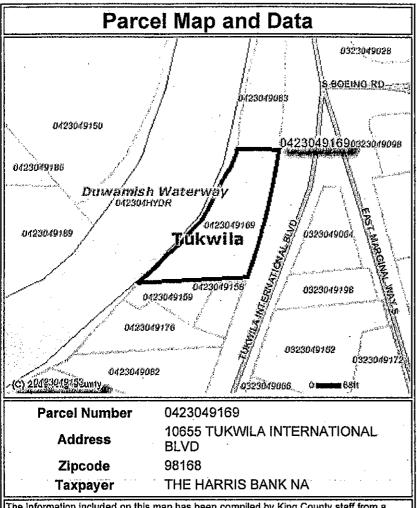
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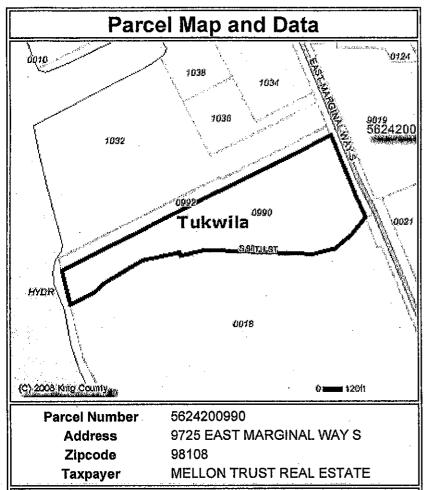
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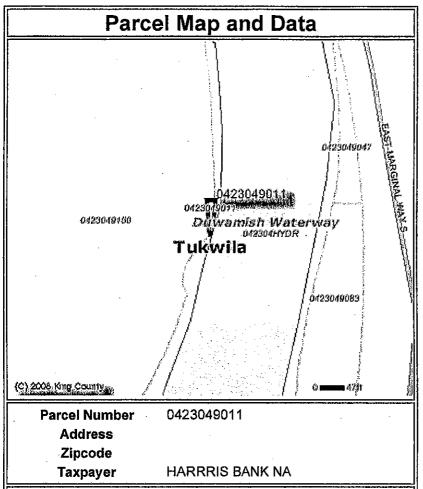
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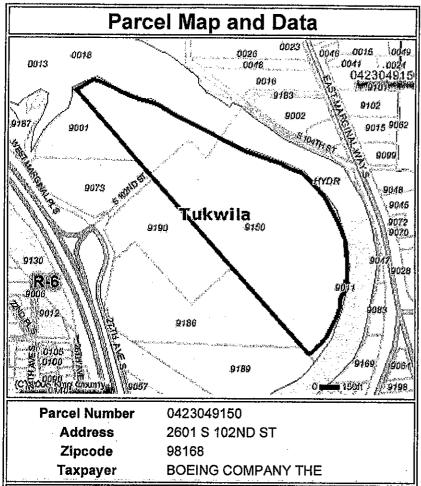


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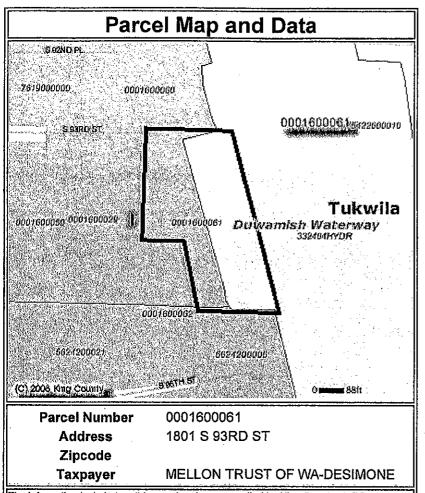
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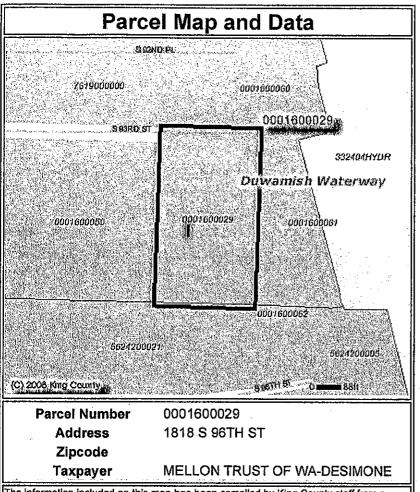


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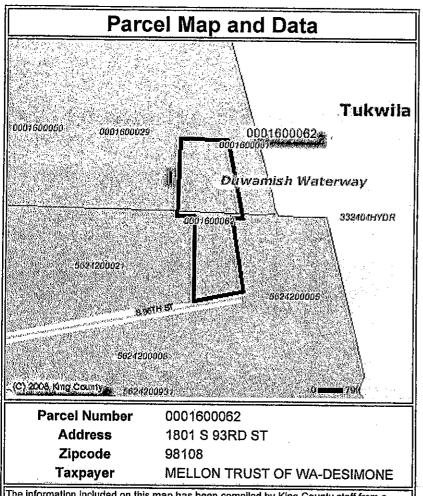


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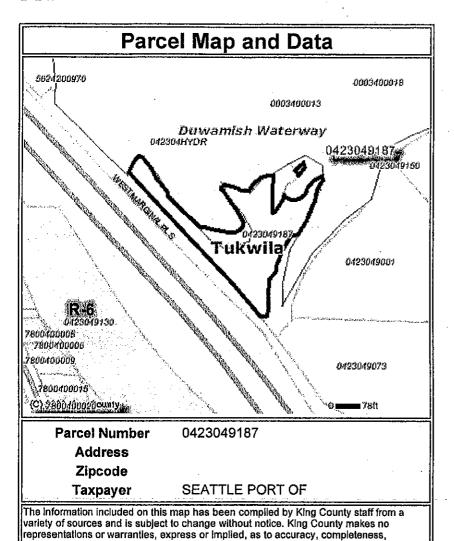
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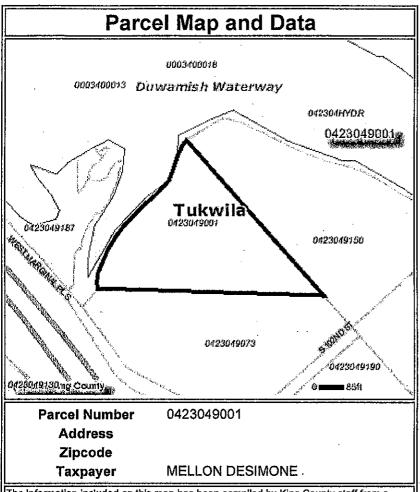
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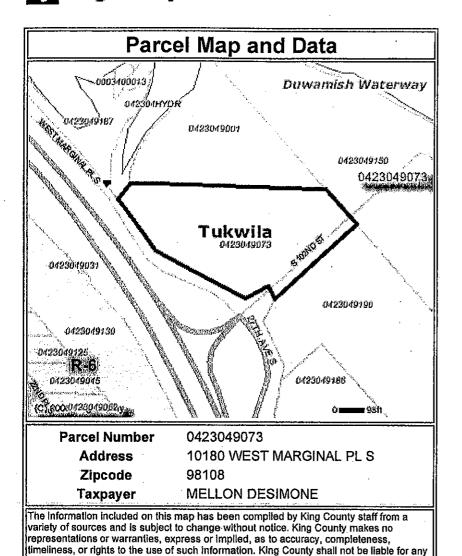
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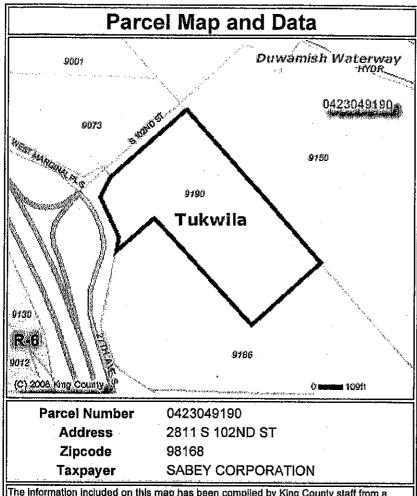


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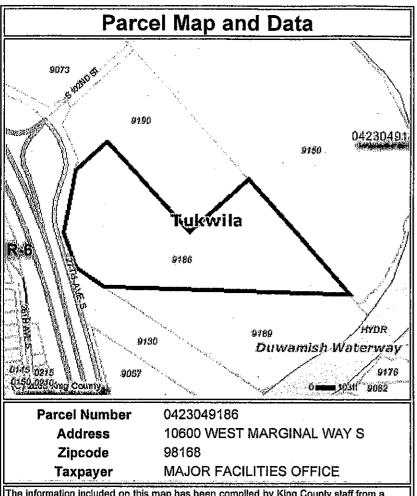
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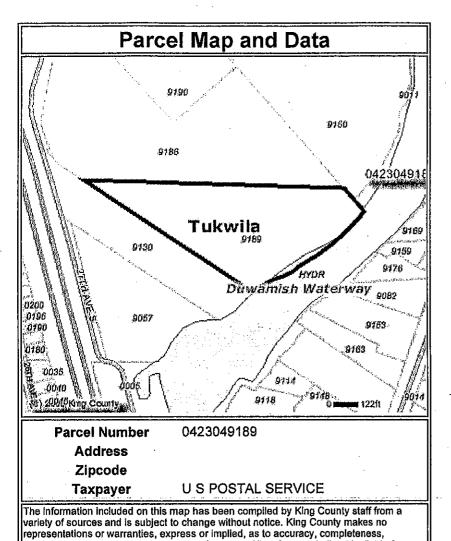
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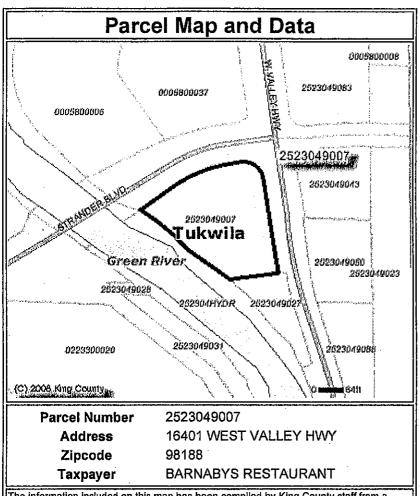
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